

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID VELASQUEZ,

Plaintiff,

v.
A. BARRIOS; C. GRAY; C. ROBERTSON; M.
LEVIN; F. PASCUA; R. TORREZ;
GONZALES; FLINT, S. THOMAS; C. HALL;
N. GRANNIS; L.E. SCRIBNER,

Defendants.

Civil No. 07cv1130-LAB (CAB)

**ORDER DENYING MOTION TO
COMPEL WITHOUT PREJUDICE
[Doc. No. 46]**

Plaintiff David Velasquez (“Plaintiff”), a state prisoner proceeding *pro se*, filed this action under 42 U.S.C. § 1983. On October 16, 2007, Plaintiff filed a First Amended Complaint against defendants F. Pascua, R. Torrez, Gonzales, Flint, S. Thomas, C. Hall, N. Grannis, L.E. Scribner, A. Barrios, C. Gray, C. Robertson, and M. Levin. [Doc. No. 9.] The First Amended Complaint was successfully served on all defendants except Flint and Gonzales. [See Doc. Nos. 12, 13, 16, 17, 31, 32.] On December 28, 2007, Defendants F. Pascua, R. Torrez, S. Thomas, C. Hall, N. Grannis, L.E. Scribner, A. Barrios, C. Gray, C. Robertson, and M. Levin (“Defendants”) filed a motion to dismiss the First Amended Complaint. [Doc. No. 32.]

On January 22, 2008, Plaintiff filed a motion to amend the summons on the First Amended Complaint to reflect the first initials of the unserved defendants, in order to then be able to obtain service as to those defendants. [Doc. No. 37.] Plaintiff also filed a letter (deemed a motion) requesting an

1 extension of time to file his opposition to the Defendants' motion to dismiss. [Doc No. 35.] On January
 2 28, 2008, the Court granted Plaintiff's motions. [Doc. No. 40.] In doing so, the Court ordered as
 3 follows:

4 1. **DIRECTS** the Clerk to amend the Summons on the First Amended Complaint
 5 as follows: Change "Flint" to "F.B. Flint or Frank B. Flint" and "Gonzales" to "J.
 6 Gonzalez or Juan Gonzalez";

7 2. **DIRECTS** the Clerk to provide Plaintiff with an additional "IFP Package"
 8 consisting of: (1) two certified copies of this Order; (2) two certified copies of the Court's
 9 order of August 28, 2007, granting IFP [Doc. No. 4]; (3) four of the amended Summons
 10 on the First Amended Complaint (see No. 1 above); (4) four certified copies of the First
 11 Amended Complaint [Doc. No. 9]; and (5) two blank USM Forms 285s for purposes of
 12 re-attempting service as to Defendants F.B. Flint/Frank B. Flint and J. Gonzalez/Juan
 13 Gonzalez;

14 3. **ORDERS** Plaintiff to complete, as accurately and clearly as possible, the new
 15 USM Marshal Form 285s provided to him with regard to defendants F.B. Flint/Frank B.
 16 Flint and J. Gonzalez/Juan Gonzalez, and return them, along with a certified copy of this
 17 order, a certified copy of the Court's order of August 28, 2007 [Doc. No. 4], three of the
 18 amended Summons on the First Amended Complaint and three certified copies of the
 19 First Amended Complaint (one for each defendant, one for the U.S. Marshal's Service
 20 files) to the U.S. Marshal no later than February 15, 2008.

21 4. **FURTHER ORDERS** that pursuant to FED.R.CIV.P. 4(c)(2), (m) and 28
 22 U.S.C. § 1915(d), the U.S. Marshall shall, within 10 days of receiving Plaintiff's updated
 23 USM Form 285s, effect service of Plaintiff's First Amended Complaint and amended
 24 summons on the First Amended Complaint upon Defendants F.B. Flint/Frank B. Flint and
 25 J. Gonzalez/Juan Gonzalez as directed by Plaintiff. All costs of service shall be advanced
 26 by the United States pursuant to the Court's order of August 28, 2007, granting Plaintiff
 27 leave to proceed IFP and directing service pursuant to 28 U.S.C. §1915(d) and
 28 FED.R.CIV.P. 4(c)(2) [Doc. No. 4].

29 5. **FURTHER ORDERS** that the Defendants' motion to dismiss [Doc. No. 32]
 30 shall be continued to March 24, 2008, at 9:00 a.m., in Department E (no oral argument).
 31 Plaintiff's opposition to the motion shall be filed no later than March 10, 2008.
 32 Defendants' reply to Plaintiff's opposition shall be filed no later than March 17, 2008.

33 [Doc. No. 40 at 4-5.]

34 The Amended Summons was issued on January 28, 2008. [Doc. No. 41.] Plaintiff was also sent
 35 an additional IFP package. [Doc. No. 40.] Plaintiff has now filed a "motion to compel." [Doc. No. 46.]
 36 For the reasons set forth below, Plaintiff's motion to compel is **DENIED WITHOUT PREJUDICE**.

37 In the motion to compel, Plaintiff claims that he continues to be unsuccessful in serving the two
 38 remaining defendants (Gonzalez and Flint). [Doc. No. 46.] There is no indication on the docket,
 39 however, that Plaintiff has tried to serve the amended summons (with the new Form 285s) on Gonzalez
 40 and Flint. Plaintiff should fulfill his obligations under this Court's previous order. Plaintiff shall have
 41 until March 14, 2008, to fill out the new Form 285s with the amended summons and provide them
 42 (along with the other documents specified) to the U.S. Marshall as set forth in this Court's order of dated
 43 January 25, 2008, Document No. 40, page 4, paragraph 3. If those Form 285s come back from the U.S.

1 Marshall indicating a continued inability to serve Gonzalez and Flint, then Plaintiff may renew this
2 motion.

3 In the meantime, the motion to dismiss as to the defendants that have been served [Doc. No. 32]
4 will go forward as previously scheduled on March 24, 2008, at 9:00 a.m. (no oral argument). On
5 February 21, 2008, Plaintiff filed an opposition to that motion. [Doc. No. 48.] Once a reply is filed by
6 defendants (due on or before March 17, 2008), the motion to dismiss will be considered fully briefed and
7 will be taken under submission by the court.

8 **IT IS SO ORDERED.**

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10 DATED: February 29, 2008

11 
12 **CATHY ANN BENCIVENGO**
13 United States Magistrate Judge
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